IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioners,

vs.

E. B. SPILLER et al.,
Respondents.

No. 572

PETITION OF MISSOURI PACIFIC RAILROAD COMPANY FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

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PETITION OF MISSOURI PACIFIC RALROAD COMPANY FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

Comes now the Missouri Pacific Railroad Company, a Missouri corporation, by its undersigned attorneys, hereinafter for convenience termed intervener, and presents to this Court the fact that claims outstanding against it approximating, without interest, a million dollars, are vitally affected by the decision of the Circuit Court of Appeals of the Eighth Circuit in this case, which de-

cision it is earnestly contended is in conflict, in many important respects, with the decisions of this Court and with the decisions of other Circuit Courts of Appeals, and intervener, therefore, joins with the petitioners, St. Louis and San Francisco Railroad Company et al., in urging that certiorari to review the decision of the Circuit Court of Appeals be granted, and prays for leave to enter its appearance herein and file *amicus curiae* brief.

The interest of intervener in this litigation is by reason of the following facts:

The Missouri Pacific Railroad Company, during 1917, through foreclosure proceedings, acquired the property of The Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. The orders and proceedings in the receivership cases were very similar to those in evidence in the case at bar. The prior companies referred to, together with other Missouri carriers, in 1905 enjoined the enforcement of certain Missouri statutory rates, and under and pursuant to the authority and orders of the United States District Court for the Western District of Missouri proceeded to collect their tariff rates then on file, which were in excess of the statutory rates. The statutory rates were upheld by this Court in 1913, and numerous claims for overcharges arose predicated on the difference between the tariff rates collected and the statutory rates. These overcharge claims were solicited by a certain claim adjuster, who, during 1916, filed in the Missouri Pacific-Iron Mountain

receivership proceedings claims approximating one million dollars. The several hundred original petitions filed by him in behalf of the various claimants were in the nature of actions for an accounting predicated on the trust-fund theory—that is to say, upon the theory that title to the overcharges never passed to the carriers, and that the overcharge funds were *ab initio* the property of the shipper. These claims are still pending and this issue is still being urged in connection with both the procedure and the classification of the claims.

The Special Master, as well as administrative Judges Hook, Sanborn and Faris, have so far uniformly held that said overcharges having been collected under and pursuant to a decree of a court of competent jurisdiction both the legal and equitable title to the money passed to the carrier at the time of the collection, and that the cause of action arose upon the reversal of the judgment, the remedy being an action for money had and received predicated on the right to restitution. None of the claims has yet reached the Circuit Court of Appeals. The views of the Special Master and the respective administrative Judges are very concisely set forth in the unreported opinion of Judge Sanborn, the relevant portion of which appears in the appendix hereof, wherein he follows the reasoning of this Court in the leading case of Bank of United States v. Bank of Washington, 6 Pet. 8 (cited with approval in Arkadelphia Company v. Ry. Co., 249 U. S. 145), to the effect that:

> "The reversal of the judgment cannot have a retroactive operation and make void that which was lawful when done. The reversal of the judgment gives a new right."

The overcharge claims against intervener which were collected under and pursuant to a decree of a court of competent jurisdiction which was afterwards reversed are closely analogous to the claims in the case at bar, wherein the rates were collected under and pursuant to a lawfully filed tariff, which rates were afterwards determined to have been unreasonably high. The remedy in the former instance is in the nature of an action for money had and received, predicated on the right to restitution, which right arises upon the reversal of the decree. The right in the latter instance is reparation and the remedy is a statutory action for damages.

United States Circuit Judges Hook and Sanborn and District Judge Faris, in the decisions above referred to, have followed the long line of decisions quoted from in the brief of petitioner, St. Louis and San Francisco Railroad Company, for writ of certiorari in this case, and the decision of the Court of Appeals for the Eighth Judicial Circuit in this case is diametrically opposed to those decisions and to the rule of property established thereby, upon which your intervener herein, it is respectfully contended, has a right to rely.

By reason of the foregoing facts intervener avers that its rights are vitally affected and greatly prejudiced by

each and all of the following findings of the Circuit Court of Appeals in this case, to wit:

(1) That claimants were not guilty of laches in failing to file their claims, and it was error to dismiss their intervening petitions on that ground (R. 722).

(2) That said claims arose after the entry of the final decree and claimants were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 722).

(3) That the Railroad Company, in collecting rates which the Commission later found to be unjust and unreasonable, and, therefore, unlawful, became a trustee *ex maleficio* (R. 722).

(4) That claimants could invoke the trust-fund doctrine, even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 718).

(5) That an equitable action, based on the trust-fund doctrine, was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 719).

(6) That claimants were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a date more than three years after the date of appointment of the Receivers on May 27, 1913 (R. 722).

Wherefore, intervener prays that certiorari be granted and that intervener be permitted to intervene herein and file *amicus curiae* briefs.

Edward W. White
.....
Thos. T. Railey
.....
Counsel for Intervener, Missouri Pacific Railroad Company.

State of Missouri, }
City of St. Louis. } ss.

Thos. T. Railey, being duly sworn, makes oath and says that he is attorney for intervener in the above cause, that he has read the foregoing petition for leave to intervene and knows the contents thereof, and that the allegations therein are true as he verily believes.

Thos. T. Railey
.....

Subscribed and sworn to before me this 26th day of August, 1926.

My commission expires. June 28th 1929

Geo. W. Collins
.....
Notary Public.

APPENDIX.

Extract from unreported opinion of Circuit Judge Walter H. Sanborn, filed March 5, 1923, holding that overcharges collected under and pursuant to a decree of a court of competent jurisdiction pending Missouri rate litigation did not constitute trust funds.

* * * * * * *

"The question in this case, therefore, is not whether or not the mortgagor company became and is liable to pay to the interveners the amount of the excessive charges it collected and interest thereon. It is admitted that the mortgagor company is so liable. The interveners claim more.

"They argue that the mortgagor company unlawfully or wrongfully collected these charges; that one who unlawfully or wrongfully collects or obtains money or property of another from him becomes immediately a trustee *ex maleficio* of that money or property for the benefit of him from whom he obtains it; and that, therefore, the mortgagor company became, the instant it collected any of these excessive charges, a trustee *ex maleficio* of the moneys thus collected for the benefit of the interveners. The soundness of the major premise of this syllogism is challenged and the crucial question in this case is, did the mortgagor company unlawfully or wrongfully collect these excessive charges and thereby make itself a trustee *ex maleficio* of the moneys it collected as fast as it received them?

* * * * * * *

"From the time the District Court first held the statutory rates of 1905 and 1907 confiscatory and issued its first restraining order or injunction until the Supreme

Court reversed its final decree, that holding was the law of the land on the subject of these rates so far as the parties to the suit before that Court were concerned, because that Court was the judicial tribunal in which the power was then vested and on which the duty was then imposed to adjudge what rates were confiscatory and what were not. While its holding and adjudication on which all its injunctions were founded and its injunctive orders remained in force, it was unlawful and wrongful for the officers of the state or others to put in force the statutory rates of 1905 and 1907, and the collection of the higher earlier-established rates by the mortgagor company was lawful and right, because it was the duty of that company to collect compensatory rates, and the Court in which the power to determine what rates were compensatory was vested had held that the lower statutory rates were confiscatory and unconstitutional. During this time the putting in force or enforcement of the use of these statutory rates by the officers of the state, their agents or others would have been unlawful, wrongful and punishable by fine or imprisonment for violation of the injunction, because during that time that judicial determination was the law of the land as between the parties to that suit. If the Supreme Court had affirmed the holding of the District Court such would have been the rights and relations of these parties and such the law upon this subject still. Its reversal of that holding adjudged that that holding was mistaken and erroneous, and vested in the interveners a right to a reparation of the losses they had sustained by the collection of the excessive rates, of the amount of which those excessive rates and interest on them were competent evidence. But that reversal did not so relate back as to render the mortgagor company's collection of the excessive charges, which was

rightful and lawful when it was made, wrongful and unlawful when it was made, nor did it have the effect to charge the mortgagor company which lawfully and rightfully made the collection and applied the moneys collected to the payment of its current expenses and obligations while the District Court's holding and injunctions were in force, as a *trustee ex maleficio* of those moneys as fast as it collected them.

"In this state of the case the interveners are entitled, upon proper proof, to the allowance of their claims, as general unsecured creditors of the mortgagor company, but the Court is unable to find, in the collection by the mortgagor company of these excessive charges in accordance with the holdings, orders and injunctions of the District Court in force at the time of their collection, any fraud, misrepresentation, deceit, illegality, wrong or breach of moral or legal duty that taints the conscience of the mortgagor company or any of its officers whose duty it was to advise and direct its course when these charges were collected, or that justifies a charge of this mortgagor company as a trustee *ex maleficio* or a trustee *de son tort* of the moneys collected from these excessive charges while the adjudications and injunctions of the District Court were in force.

"Judge James A. Seddon, the Special Master in this case; Judge George C. Hitchcock, the Special Master in the case of Guaranty Trust Company of New York, and Benjamin F. Edwards, trustees, against the Missouri Pacific Railway Company in the matter of the intervention of the Laclede Gas Light Company, after an exhaustive study and consideration of the question here involved and a review of the authorities, and Judge Hook, upon consideration of exceptions to the report of Judge Hitchcock, have reached the conclusion which has just been stated,

and the present consideration of the question has convinced the Court that their decisions were right.

"Reference is made to the reports of Special Masters Hitchcock and Seddon for citations and reviews of the authorities pertinent to the question that has been considered.

"This question was not discussed, determined or adjudged by the Court in St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight, 244 U. S. 368, 369, 371, 372, 375; Bellamy v. St. Louis, Iron Mountain Ry. Co., 220 Fed. 876, 877; Love v. North American Company, 229 Fed. 103, and other like cases, in which the mortgagor was not justified in its collection of excessive charges by the holding and injunctions in its favor in full force of the judicial tribunal authorized to determine the question confiscatory or not or in which the mortgagor company did not claim such protection, or in which the question at issue was the general liability of the company to pay the shippers an amount equal to the excessive charges and interest, and no question of its taking those collections as a trustee *ex maleficio* was deliberately considered or decided. And remarks of the Courts in their opinions in such cases that might have been persuasive if they had been deliberately made after presentation and discussion of the very questions here at issue are not very persuasive, much less authoritative here, under the oft-quoted rule announced by Chief Justice Marshall in these words:

> " 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The

> question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated' (Cohens v. Virginia, 19 U. S. 264, 399; King v. Pomeroy, 121 Fed. 287, 294; Traer v. Fowler, 114 Fed. 810, 816).

"On the other hand, such established and indisputable rules of law and equity as that a subsisting order, decree or judgment of a court having jurisdiction of the subject matter and the parties, though subsequently reversed for error, is binding upon them and constitutes a sufficient justification for acts done under and in accordance of it before its reversal, and that such a reversal does not have such a retroactive effect as to make unlawful or wrong, at the times they are done, acts lawfully done at such times in accordance with the order, judgment or decree before its reversal. United States v. Bank of Washington, 31 U. S. 716; Gat v. Smith, 39 N. H. 171, 176; Field v. Anderson, 103 Ill. 403, 406; 2 Freeman on Judgments, Sec. 482; Ruling Case Law, Sec. 245, ought not to be disregarded.

"The result is that the interveners were not entitled to a discovery or accounting in equity on the ground that the mortgagor company became a trustee *ex maleficio* of the moneys collected from the excessive charges at the times it collected them, because it did not become such a trustee."